STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant/Cross-Appellee, v DWIGHT-STERLING DAVID JAMBOR, Defendant-Appellee/Cross-Appellant.	FOR PUBLICATION January 4, 2007 9:05 a.m. No. 259014 Oakland Circuit Court LC No. 2004-194043-FH ON REMAND Official Reported Version

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court. We reverse.

The facts underlying this case are set forth in our initial opinion. See *People v Jambor*, 271 Mich App 1; 717 NW2d 889, rev'd 477 Mich 853 (2006). To summarize, on August 20, 2003, a break-in occurred at the Bloomfield Surf Club in Bloomfield Township. Officer Paul Schwab responded to the scene and learned that the perpetrator had gained entrance to the club by breaking a sliding glass window. Approximately $50 had been taken from a cash box, which was located on a counter. Evidence technician Robert Brien responded to the scene and lifted fingerprints from the point of entry and the cash box. Brien attached the tape for each print lifted to an individual fingerprint card, and on the back of each fingerprint card he wrote the complaint number, the date, and the location from which the fingerprint was lifted. Brien recovered seven fingerprints. He attached three fingerprints to black fingerprint cards and four fingerprints to white fingerprint cards. At the time the fingerprints were lifted from the scene, no person had been identified as a suspect. The fingerprints were placed in the Automated Fingerprint Identification System (AFIS). The AFIS identified a fingerprint on a white fingerprint card as belonging to defendant. No fingerprint on any other fingerprint card matched defendant's fingerprints. Defendant was charged with breaking and entering with intent to commit larceny in connection with the incident.

Defendant moved to exclude the seven fingerprint cards on the ground that they constituted inadmissible hearsay. The trial court held an evidentiary hearing on September 22, 2004. Brien had died in the interim; therefore, Schwab testified regarding Brien's activities at the crime scene. Schwab testified that the location listed on each card was consistent with a location where he observed Brien lift a fingerprint. Schwab identified the handwriting on each card as

that of Brien. Schwab acknowledged that during the time he observed Brien at the scene, he saw Brien use only black cards.

The trial court granted defendant's motion to suppress in part and denied it in part. The trial court excluded the four white cards on the ground that the prosecution failed to lay a proper foundation for the admission of those cards into evidence. The trial court ruled that the black cards were admissible under MRE 803(8), the public records exception to the hearsay rule, because they were made part of a police report at a time when there was no adversarial relationship with defendant. The trial court then granted defendant's motion to dismiss the case.

We affirmed the trial court's dismissal of the case after concluding that the trial court did not abuse its discretion by determining that the prosecution had failed to authenticate the four white fingerprint cards and that the proper foundation for admission of the evidence was not established. The Supreme Court reversed our judgment, holding that the white fingerprint cards were properly authenticated under MRE 901 as fingerprint cards relating to the offense. 477 Mich 853 (2006). The Court directed us to consider on remand the remaining issues raised by the parties in the initial appeal and cross-appeal. We must now determine whether admission of the fingerprint cards would violate the rules of evidence or the Confrontation Clause.[1]

The decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). A preliminary issue of law regarding admissibility based on construction of a constitutional provision, rule of evidence, court rule, or statute is subject to review de novo. *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006).

A. Hearsay Exceptions

"Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). A statement can be either an oral or a written assertion. MRE 801(a). Hearsay is inadmissible unless subject to an enumerated exception. MRE 802.

1. MRE 803(6)

MRE 803(6), the business records exception to the hearsay rule, provides in pertinent part:

> Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation,

[1] US Const, Am VI.

> all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

The business records exception is based on the inherent trustworthiness of business records. But that trustworthiness is undermined and can no longer be presumed when the records are prepared in anticipation of litigation. *Solomon v Shuell*, 435 Mich 104, 120-121; 457 NW2d 669 (1990) (police reports deemed inadmissible under MRE 803[6] because officers who prepared reports knew they were subjects of a homicide investigation). *People v McDaniel*, 469 Mich 409; 670 NW2d 659 (2003), concerned the admissibility of a laboratory report identifying as heroin the contents of a packet sold by the defendant to an undercover officer. The chemist who tested the contents of the packet did not testify at trial. Another police chemist testified, however, that a misidentification of a substance had never occurred during his term of employment. The trial court admitted the evidence, and a jury convicted the defendant. This Court affirmed the defendant's conviction. *Id*. at 410-412. The *McDaniel* Court found that the report was inadmissible under MRE 803(6) because it was prepared in anticipation of litigation and, therefore, was not sufficiently trustworthy. *Id*. at 414.[2]

The prosecution argues that the fingerprint cards were admissible under MRE 803(6). The prosecution notes that Schwab testified that Brien prepared the fingerprint cards in the normal course of practice for an evidence technician. Moreover, the prosecution emphasizes that when Brien prepared the fingerprint cards, no person, including defendant, was identified as a suspect in the break-in. Therefore, the fingerprint cards did not lack sufficient indicia of trustworthiness.

Defendant argues that the fingerprint cards constitute hearsay not admissible under any exception. Specifically, defendant asserts that fingerprint cards are not admissible under the public records exception of MRE 803(8) and that admission of the cards under MRE 803(6) would be inconsistent with the purposes of MRE 803(8).

The uncontradicted evidence showed that the fingerprint cards were prepared during the normal course of investigating a crime scene. Schwab observed Brien prepare some of the cards using regularly established practices. Moreover, it is undisputed that no person was identified as a suspect in the break-in at the time Brien prepared the fingerprint cards. This fact distinguishes this case from *McDaniel*. In *McDaniel*, the laboratory report at issue was prepared with the goal of establishing an element of the crime with which the defendant was charged, i.e., that the substance the defendant delivered was heroin. The *McDaniel* Court reasoned that the trustworthiness inherent in business records was undermined when the report was prepared in anticipation of litigation; therefore, the report was inadmissible because the circumstances under which it was prepared lacked sufficient indicia of trustworthiness. *McDaniel*, *supra* at 414; see also *People v Huyser*, 221 Mich App 293, 298; 561 NW2d 481 (1997) (physician's report

[2] This Court did not rule on the admissibility of the report under MRE 803(6), but the Supreme Court chose to address the issue.

inadmissible under MRE 803[6] because prepared specifically for purposes of litigation against the defendant).

Here the fingerprint cards were prepared with the ultimate goal of identifying a suspect in the break-in, but were not prepared specifically in anticipation of litigation against defendant. No adversarial relationship existed between defendant and law enforcement at the time the fingerprint cards were prepared. The argument that evidence such as fingerprint cards prepared under circumstances similar to those presented by this case is inadmissible under MRE 803(6) and *McDaniel* could, taken to its logical extreme, preclude the admission of any physical evidence such as fingerprints or shoeprints. No authority holds that such evidence, which must be collected and preserved by law enforcement to be useable, is inadmissible under all circumstances. Such a holding would not serve the purposes of MRE 803(6). We conclude that the fingerprint cards are admissible as business records under MRE 803(6).

2. MRE 803(8)

MRE 803(8), the public records exception to the hearsay rule, provides:

> Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.[3]

The public records exception has been construed to allow admission of routine police reports made in a nonadversarial setting, notwithstanding the literal language of the rule. *McDaniel*, *supra* at 413; *People v Stacy*, 193 Mich App 19, 33; 484 NW2d 675 (1992).

The trial court ruled that MRE 803(8) did not preclude admission of the fingerprint cards. The prosecution argues that the fingerprint cards are admissible under MRE 803(8) because they contain only routine information and were prepared as part of an investigation during a time when defendant was not a suspect in the break-in. Defendant argues that MRE 803(8) precludes admission of the fingerprint cards because the cards contain information regarding matters observed by law enforcement personnel.

The fingerprint cards contained "matters observed by police officers" to the extent that the fingerprint cards identified the locations at which the fingerprints were found. But Brien prepared the fingerprint cards as part of a routine police investigation of a break-in. The mere lifting of a latent print from an object is, in and of itself, "ministerial, objective, and nonevaluative." *United States v Gilbert*, 774 F2d 962, 965 (CA 9, 1985) (fingerprint card and note on card specifying location of print admissible under FRE 803[8]). Furthermore, in this

[3] MCL 257.624 details the types of reports that are not available for use in court actions. The limitations in this statute are inapplicable in this case.

case the fingerprint cards were prepared at a time when defendant was not a suspect and, therefore, in a setting that was not adversarial to defendant. Cf. *McDaniel*, *supra* at 413.

The present case is distinguishable from *People v Hernandez*, 7 Misc 3d 568; 794 NYS2d 788 (2005), on which defendant relies for the proposition that admission of fingerprint cards is precluded under the public records exception to the hearsay rule. In *Hernandez*, the court construed FRE 803(8) to exclude a latent fingerprint report. But that report, unlike the fingerprint cards at issue in this case, contained information regarding the technician's activities on the day the prints were lifted and detailed the methods the technician used to recover the prints. The report contained subjective and evaluative information in addition to objective information. The fingerprint cards prepared by Brien are comparable to the card deemed admissible in *Gilbert* in that they were prepared as part of a routine investigation and contained only objective information. We conclude that the fingerprint cards are admissible as public records pursuant to MRE 803(8).

B. Confrontation Clause

The Confrontation Clause guarantees an accused the right to confront witnesses against him. US Const, Am VI. In *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court overruled its prior decision in *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), and held that testimonial hearsay evidence, such as a statement made to police, is admissible only in circumstances in which the declarant is unavailable, and only if the defendant had a prior opportunity to cross-examine the declarant. The *Crawford* Court noted that although the ultimate goal of the Confrontation Clause is to ensure the reliability of evidence, it is a procedural rather than a substantive guarantee, and held that admitting a hearsay statement deemed reliable by a judge pursuant to various factors was at odds with the right of confrontation guaranteed by the Confrontation Clause. The *Crawford* Court reasoned that the Confrontation Clause demanded not only that evidence be reliable, but also that its reliability be assessed by testing it by cross-examination. *Crawford*, *supra* at 60-68.

The *Crawford* Court declined to provide a comprehensive list of what hearsay statements are testimonial. However, the *Crawford* Court went so far as to hold that prior trial testimony clearly constituted testimonial hearsay, as did pretrial statements if the declarant could reasonably expect that the statement would be used "in a prosecutorial manner," see *People v Lonsby*, 268 Mich App 375, 377; 707 NW2d 610 (2005) (plurality opinion), and if the statement was made "'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Crawford*, 541 US at 51-52 (citation omitted). The *Crawford* Court did observe that business records are not testimonial. *Id*. at 56.[4]

The prosecution argues that the fingerprint cards are business records and, therefore, admission of the cards will not violate the Confrontation Clause. For the reasons stated earlier,

[4] Rehnquist, C.J., concurring, also asserted that public records are not testimonial. *Id*. at 76.

we conclude that the fingerprint cards are admissible under the business records exception to the hearsay rule; therefore, the cards are not testimonial. *Id*.

Even assuming that the fingerprint cards are not admissible as business records or public records, *Crawford* does not preclude admission of the cards. In *Lonsby*, Judge Saad stated that testimony from a serologist about a nontestifying serologist's notes and lab report constituted testimonial hearsay that was inadmissible under *Crawford* because the nontestifying serologist reasonably would have expected that the notes and report would be used in a prosecutorial manner. *Lonsby, supra* at 391. The other members of the *Lonsby* panel concurred in the result only. Judge Saad also noted that other jurisdictions were split regarding whether a lab report itself was testimonial and whether admission of such a report violated the Confrontation Clause. *Id*. at 391 n 10.

This case differs from *Lonsby* and *Hernandez* in that the fingerprint cards prepared by Brien contained no subjective statements, whereas the reports at issue in *Lonsby* and *Hernandez* detailed the analytical work performed by the nontestifying technician. Brien did not compare the fingerprints he found at the scene of the break-in to any other prints on file. Personnel at the AFIS performed that comparison. No information recorded by Brien on the cards could be used to assert that any fingerprint found at the scene belonged to defendant. Any testimony to the effect that a print lifted by Brien matched a print belonging to defendant would come from another source and presumably would be subject to cross-examination. Accordingly, we conclude that admission of the fingerprint cards will not violate *Crawford*.

We reverse that portion of the trial court's ruling suppressing the white fingerprint cards and remand for reinstatement of the charge against defendant. Jurisdiction is not retained.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald